

This Page Is Inserted by IFW Operations
and is not a part of the Official Record

BEST AVAILABLE IMAGES

Defective images within this document are accurate representations of the original documents submitted by the applicant.

Defects in the images may include (but are not limited to):

- BLACK BORDERS
- TEXT CUT OFF AT TOP, BOTTOM OR SIDES
- FADED TEXT
- ILLEGIBLE TEXT
- SKEWED/SLANTED IMAGES
- COLORED PHOTOS
- BLACK OR VERY BLACK AND WHITE DARK PHOTOS
- GRAY SCALE DOCUMENTS

IMAGES ARE BEST AVAILABLE COPY.

**As rescanning documents *will not* correct images,
please do not report the images to the
Image Problem Mailbox.**



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/067,069	02/06/2002	Mehmet-Fatih Sen	2009	4058

7590 09/26/2003

STRIKER, STRIKER & STENBY
103 East Neck Road
Huntington, NY 11743

EXAMINER

MICHALSKY, GERALD A

ART UNIT PAPER NUMBER

3753

DATE MAILED: 09/26/2003

10

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/067,069

Applicant(s)

SEN, MEHMET-FATIH

Examiner

Gerald A. Michalsky

Art Unit

3753

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 2 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 02 September 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☒ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-12 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 1-12 is/are allowed.
- 6) ☐ Claim(s) _____ is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☒ The proposed drawing correction filed on 02 September 2003 is: a) ☐ approved b) ☒ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

DETAILED ACTION

1. Regarding applicant's request that the filing date of the application be corrected, the examiner does not have the authority to correct the filing date. Applicant should promptly file a petition to the Commissioner under 37 CFR 1.10(c) to correct the filing date of the application. See Section 513 of the Manual of Patent Examining Procedure (copy attached), particularly the paragraph titled, "PETITION TO CORRECT FILING DATE AND DATE-IN DISCREPANCY". The examiner cannot acknowledge applicant's claim for foreign priority until the filing date of the application is corrected.
2. The proposed drawing correction filed 02 September 2003 has been disapproved. In the proposed drawing correction to Figure 1, applicant shows two separate embodiments in the same figure. This is confusing and inaccurate. In lines 2-4 of the paragraph bridging pages 17 and 18 of the specification it is stated "it is also possible to dispense with the connecting passage 74 with the inserted throttling device 76, and to provide between the pressure chamber 58 (should be 50a) and the return passage 64b a gap 80 as the throttling device 76." Separate embodiments cannot be shown on the same figure. The orifice opening 81 shown in the proposed drawing correction is not used with the annular gap 80 shown in the proposed drawing correction. Applicant should file a proposed drawing correction with the orifice opening 81 and annular gap 80 shown in separate figures. In other words, the orifice opening specified in claim 6 should not be shown in the same figure as the annular gap specified in claim 3. Applicant should file a proposed drawing correction, amending the text if necessary, in order to avoid abandonment.

Art Unit: 3753

3. The disclosure is objected to because of the following informalities: On page 12, line 10, "56" should be --58-. In line 2 of the paragraph bridging pages 17 and 18, it appears that "1" should be inserted after "Figure". In line 5 of the paragraph bridging pages 17 and 18, "58" should be --50a-. On page 19, line 8, "74" should be --76-. On page 19, line 10, "17" should be --76-. On page 20, line 11, "20" should be --20a-. On page 20, line 13, "28" should be --20a-.

Appropriate correction is required.

4. This application is in condition for allowance except for the following formal matters:

See the matters above.

Prosecution on the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

A shortened statutory period for reply to this action is set to expire **TWO MONTHS** from the mailing date of this letter.


5. Claims 1-12 are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Gerald A. Michalsky whose telephone number is (703) 308-1049. The examiner can normally be reached on M-F 5:30 AM - 2 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, John Rivell, can be reached on (703) 308-2599. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

Art Unit: 3753

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0861.


Gerald A. Michalsky
Primary Examiner
Art Unit 3753

GM
September 24, 2003

All Certificates of Mailing or Transmission filed in applications should be placed in the file wrappers directly below the papers to which they refer.

TC personnel receiving a hand-delivered paper from other than U.S. Postal Service personnel should inspect the paper to ensure that the benefits of 37 CFR 1.8 or "Express Mail" benefits under 37 CFR 1.10 are not accorded in error. If the paper contains a certificate of mailing under 37 CFR 1.8 or "Express Mail" mailing label (commonly used to comply with 37 CFR 1.10), the words "HAND DELIVERED" should be written adjacent to the TC date stamp.

Applicant should be notified in the next Office action when a paper containing a Certificate of Mailing has been denied the benefits under 37 CFR 1.8 or a paper containing an "Express Mail" mailing label (commonly used to comply with 37 CFR 1.10) is denied benefits under 37 CFR 1.10 by including, for example, form paragraph 5.04.

¶ 5.04 Benefit of Certificate of Mailing Denied

The [1] filed [2] is not entitled to the benefits of 37 CFR 1. [3] since it was not deposited with the U. S. Postal Service for delivery to the U.S. Patent and Trademark Office. Therefore, the date of receipt in the U.S. Patent and Trademark Office has been used to determine the timeliness of the paper.

Examiner Note:

1. This form paragraph is to be used in those situations where correspondence contains a Certificate of Mailing under 37 CFR 1.8 or requests the benefit of "Express Mail" under 37 CFR 1.10, but the correspondence was not actually deposited with the U. S. Postal Service.
2. In bracket 3, insert --8-- or --10--, as appropriate.

Misuse of a Certificate of Mailing under 37 CFR 1.8 or improperly claiming the benefit of 37 CFR 1.10 which appears to be more than a one-time, inadvertent error should be brought to the attention of the Office of Enrollment and Discipline.

ORIGINAL MAILED PAPER NOT DELIVERED

Paragraphs (b) and (c) of 37 CFR 1.8 concern the situation where a paper containing a Certificate was timely deposited in the U.S. mail or transmitted by facsimile, but never received by the U.S. Patent and Trademark Office. In the TCs, all submissions under these paragraphs should be considered and the sufficiency thereof determined by the TC Director. The statement required by 37 CFR 1.8(b)(3) is no longer required to be verified.

513 Deposit as Express Mail with U.S. Postal Service

35 U.S.C. 21. Filing date and day for taking action.

(a) The Director may by rule prescribe that any paper or fee required to be filed in the Patent and Trademark Office will be considered filed in the Office on the date on which it was deposited with the United States Postal Service or would have been deposited with the United States Postal Service but for postal service interruptions or emergencies designated by the Director.

37 CFR 1.6. Receipt of correspondence.

(a) Date of receipt and Express Mail date of deposit. Correspondence received in the Patent and Trademark Office is stamped with the date of receipt except as follows:

(1) The Patent and Trademark Office is not open for the filing of correspondence on any day that is a Saturday, Sunday, or Federal holiday within the District of Columbia. Except for correspondence transmitted by facsimile under paragraph (a)(3) of this section, or filed electronically under paragraph (a)(4) of this section, no correspondence is received in the Office on Saturdays, Sundays, or Federal holidays within the District of Columbia.

(2) Correspondence filed in accordance with § 1.10 will be stamped with the date of deposit as "Express Mail" with the United States Postal Service.

(3) Correspondence transmitted by facsimile to the Patent and Trademark Office will be stamped with the date on which the complete transmission is received in the Patent and Trademark Office unless that date is a Saturday, Sunday, or Federal holiday within the District of Columbia, in which case the date stamped will be the next succeeding day which is not a Saturday, Sunday, or Federal holiday within the District of Columbia.

(4) Trademark-related correspondence transmitted electronically will be stamped with the date on which the Office receives the transmission.

37 CFR 1.10. Filing of correspondence by "Express Mail".

(a) Any correspondence received by the Patent and Trademark Office (Office) that was delivered by the "Express Mail Post Office to Addressee" service of the United States Postal Service (USPS) will be considered filed in the Office on the date of deposit with the USPS. The date of deposit with the USPS is shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation. If the USPS deposit date cannot be determined, the correspondence will be accorded the Office receipt date as the filing date. See § 1.6(a).

(b) Correspondence should be deposited directly with an employee of the USPS to ensure that the person depositing the correspondence receives a legible copy of the "Express Mail" mailing label with the "date-in" clearly marked. Persons dealing indirectly with the employees of the USPS (such as by deposit in an "Express Mail" drop box) do so at the risk of not receiving a

copy of the "Express Mail" mailing label with the desired "date-in" clearly marked. The paper(s) or fee(s) that constitute the correspondence should also include the "Express Mail" mailing label number thereon. See paragraphs (c), (d) and (e) of this section.

(c) Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that there is a discrepancy between the filing date accorded by the Office to the correspondence and the date of deposit as shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation, may petition the Commissioner to accord the correspondence a filing date as of the "date-in" on the "Express Mail" mailing label or other official USPS notation, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date other than the USPS deposit date;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and

(3) The petition includes a true copy of the "Express Mail" mailing label showing the "date-in," and of any other official notation by the USPS relied upon to show the date of deposit.

(d) Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Commissioner to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and

(3) The petition includes a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS.

(e) Any person mailing correspondence addressed as set out in § 1.1(a) to the Office with sufficient postage utilizing the "Express Mail Post Office to Addressee" service of the USPS but not received by the Office, may petition the Commissioner to consider such correspondence filed in the Office on the USPS deposit date, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has no evidence of receipt of the correspondence;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail";

(3) The petition includes a copy of the originally deposited paper(s) or fee(s) that constitute the correspondence showing the number of the "Express Mail" mailing label thereon, a copy of any returned postcard receipt, a copy of the "Express Mail" mailing label showing the "date-in," a copy of any other official notation by the USPS relied upon to show the date of deposit, and, if the requested filing date is a date other than the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS, a showing pursuant to paragraph (d)(3) of this section that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day; and

(4) The petition includes a statement which establishes, to the satisfaction of the Commissioner, the original deposit of the correspondence and that the copies of the correspondence, the copy of the "Express Mail" mailing label, the copy of any returned postcard receipt, and any official notation entered by the USPS are true copies of the originally mailed correspondence, original "Express Mail" mailing label, returned postcard receipt, and official notation entered by the USPS.

(f) The Office may require additional evidence to determine if the correspondence was deposited as "Express Mail" with the USPS on the date in question.

The statutory authority for the granting of a filing date based on the date of deposit for correspondence sent by "Express Mail" and received by the Office is found in section 21(a) of Title 35 of the United States Code.

The specific rule for obtaining a filing date as of the date of deposit in "Express Mail" (rather than the date of receipt at the Office) is 37 CFR 1.10, as revised, effective December 2, 1996.

EFFECTIVE DATE, WEEKENDS & HOLIDAYS

Effective December 2, 1996, 37 CFR 1.6(a)(2) provides that correspondence deposited as "Express Mail" in accordance with 37 CFR 1.10 will be stamped, and, therefore, considered as filed on the date of its deposit; regardless of whether that date is a Saturday, Sunday or Federal holiday within the District of Columbia. 37 CFR 1.10 provides a procedure for assigning the date on which any paper or fee is deposited as "Express Mail" with the United States Postal Service (USPS) as the filing date of the paper or fee in the U.S. Patent and Trademark Office (Office). The date of deposit with the USPS is shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation. This holds true for any day that the correspondence may be accepted as "Express Mail" by the USPS, even when the paper or fee is deposited and accepted on a Saturday, Sunday

MANUAL OF PATENT EXAMINING PROCEDURE

or Federal holiday within the District of Columbia. For example, if a person files a patent application by "Express Mail" with the USPS on a Saturday in compliance with 37 CFR 1.10, he or she will receive the benefit of the Saturday date, even though the Office is closed on Saturdays and, therefore, the person could not have filed the application by depositing it directly at the Office on that Saturday. See 37 CFR 1.6(a)(1). In those cases where the procedure of 37 CFR 1.10(a) has not been properly followed, e.g., the "date-in" is illegible, the filing date of the correspondence will be the date of actual receipt in the Office. An applicant may file a petition under the conditions specified in 37 CFR 1.10(c), (d) or (e) (discussed below) presenting whatever arguments and evidence that the paper or fee is entitled to a filing date other than the filing date accorded by the Office.

DATE-IN, DIRECT DEPOSIT, "EXPRESS MAIL" BOX RECEPTACLES & LOG BOOKS

The procedure in 37 CFR 1.10(a) requires the use of the "Express Mail Post Office to Addressee" service of the USPS. This service provides for the use of a mailing label on which the USPS clearly indicates the date on which it was deposited. Correspondence sent by the "Express Mail Post Office to Addressee" service is considered filed in the Office on the "date-in" entered by the USPS. The "date-in" on the "Express Mail" mailing label must be completed by the USPS, not by the applicant. For correspondence filed in accordance with 37 CFR 1.10, Office personnel will routinely look to the "Express Mail" mailing label, and stamp the "date-in" or other official USPS notation as the filing date of the correspondence. Accordingly, if the USPS enters the deposit date as its "date-in," the correspondence will receive the deposit date as its filing date. If the USPS deposit date cannot be determined, the correspondence will be accorded the date of receipt in the Office as the filing date. An applicant may file a petition under the conditions specified in 37 CFR 1.10(c), (d), or (e) (discussed below) presenting whatever arguments and evidence that the paper or fee is entitled to a filing date other than the filing date accorded by the Office.

37 CFR 1.10(b) further provides that correspondence should be deposited directly with an employee of the USPS to ensure that the person depositing the correspondence receives a legible copy of the

"Express Mail" mailing label with the "date-in" clearly marked, and that persons dealing indirectly with the employees of the USPS (such as by depositing correspondence in an "Express Mail" drop box) do so at the risk of not receiving a copy of the "Express Mail" mailing label with the desired "date-in" clearly marked. On petition, the failure to obtain an "Express Mail" receipt with the "date-in" clearly marked may be considered an omission that could have been avoided by the exercise of due care, as discussed below. While the Office strongly urges direct deposit of "Express Mail" correspondence in order to obtain a legible copy of the "Express Mail" mailing label, parties are not precluded from using "Express Mail" drop boxes, but do so at their own risk.

A paper or fee placed in an "Express Mail" box receptacle after the box has been cleared for the last time on a given day will be considered to be deposited as of the date of receipt ("date-in") indicated on the "Express Mail" mailing label by the Postal Service "Express Mail" acceptance clerk. 37 CFR 1.10(d) permits the Office to correct a USPS "date-in" error when the correspondence is deposited in an "Express Mail" drop box prior to last scheduled pick up of the day, that is, the time clearly marked on the "Express Mail" drop box indicating when the box will be cleared for the last time on the date of deposit. 37 CFR 1.10(d) sets forth the procedures to be followed to be entitled to such a correction.

Parties who do use drop boxes can protect themselves from uncertainty due to illegible mailing labels by routinely maintaining a log of "Express Mail" deposits in which notations are entered by the person who deposited the correspondence as "Express Mail" within one business day after deposit with the USPS. Such evidence could be useful to later support a petition filed under 37 CFR 1.10(c), (d) or (e). Evidence that came into being after deposit and within one day after the deposit of the correspondence as "Express Mail" may be in the form of a log book which contains information such as the "Express Mail" number; the application number, attorney docket number or other such file identification number; the place, date and time of deposit; the time of the last scheduled pick-up for that date and place of deposit; the depositor's initials or signature; and the date and time of entry in the log.

"EXPRESS MAIL" MAILING LABEL NUMBER

Effective December 2, 1996, 37 CFR 1.10(b) no longer requires a certificate of mailing by "Express Mail" or that the "Express Mail" mailing label number be placed on the correspondence prior to mailing. Correspondence deposited with the USPS on or after December 2, 1996, and which is actually received by the Office will not be denied a filing date as of the "date-in" appearing on the "Express Mail" mailing label because the number of the "Express Mail" mailing label was not placed on the correspondence prior to the original mailing. However, if the number of the mailing label did not appear on the correspondence as originally filed, relief will not be granted on petition under 37 CFR 1.10(c) through (e), even if the party who filed the correspondence satisfies the other requirements of 37 CFR 1.10(c), 1.10(d) or 1.10(e). To be effective, the number must be placed on each separate paper and each fee transmittal either directly on the document or by a separate paper firmly and securely attached thereto. In situations wherein the correspondence includes several papers directed to the same application (for example, the specification, drawings, and declaration for a new application), the correspondence may be submitted with a cover or transmittal letter which should itemize the papers. It is not necessary that the number be placed on each page of a particular paper or fee transmittal. Merely placing the number in one prominent location on each separate paper or fee transmittal (or cover sheet or transmittal letter which should itemize the separate papers and fees) will be sufficient.

Since the filing of correspondence under 37 CFR 1.10 without the number of the "Express Mail" mailing label thereon is an oversight that can be avoided by the exercise of reasonable care, requests for waiver of this requirement will not be granted on petition. A party's inadvertent failure to comply with the requirements of a rule is not deemed to be an extraordinary situation that would warrant waiver of a rule under 37 CFR 1.183, 2.146(a)(5) or 2.148, nor is such an inadvertent omission considered "unavoidable," within the meaning of 15 U.S.C. 1062(b), 35 U.S.C. 133, 37 CFR 1.137(a) or 37 CFR 2.66(a). See *Honigsbaum v. Lehman*, 903 F. Supp. 8, 37 USPQ2d 1799 (D.D.C. 1995) (Commissioner did not abuse his discretion in refusing to waive requirements of 37 CFR 1.10(c) in order to grant filing date to patent application, where

applicant failed to produce "Express Mail" customer receipt or any other evidence that application was actually deposited with USPS as "Express Mail."), *aff'd without opinion*, 95 F.3d 1166 (Fed. Cir. 1996); *Nitto Chemical Industry Co., Ltd. v. Comer*, 39 USPQ2d 1778, 1782 (D.D.C. 1994) (Commissioner's refusal to waive requirements of 37 CFR 1.10 in order to grant priority filing date to patent application not arbitrary and capricious, because failure to comply with the requirements of 37 CFR 1.10 is an "avoidable" oversight that could have been prevented by the exercise of ordinary care or diligence, and thus not an extraordinary situation under 37 CFR 1.183.); *Vincent v. Mossinghoff*, 230 USPQ 621 (D.D.C. 1985) (misunderstanding of 37 CFR 1.8 not unavoidable delay in responding to Office Action); *Gustafson v. Strange*, 227 USPQ 174 (Comm'r Pat. 1985) (counsel's unawareness of 37 CFR 1.8 not extraordinary situation warranting waiver of a rule); *In re Chicago Historical Antique Automobile Museum, Inc.*, 197 USPQ 289 (Comm'r Pat. 1978) (since certificate of mailing procedure under 37 CFR 1.8 was available to petitioner, lateness due to mail delay not deemed to be extraordinary situation).

PETITIONS

37 CFR 1.10(c) through 1.10(e) set forth procedures for petitioning the Commissioner to accord a filing date as of the date of deposit as "Express Mail." Briefly, 37 CFR 1.10(c) applies where there is a discrepancy between the filing date accorded by the Office and the "date-in" entered by the USPS on the "Express Mail" mailing label or other official USPS notation; 37 CFR 1.10(d) applies where the "date-in" is incorrectly entered by the USPS; and 37 CFR 1.10(e) applies where correspondence deposited with the USPS as "Express Mail" is not received by the Office.

PETITION TO CORRECT FILING DATE AND DATE-IN DISCREPANCY

37 CFR 1.10(c) sets forth procedures for filing a petition to the Commissioner for a filing date as of the date of deposit with the USPS, where there is a discrepancy between the filing date initially accorded by the Office and the "date-in" entered by the USPS or other official USPS notation. Such a petition should:

(A) be filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date other than the USPS deposit date;

(B) include a showing that the number of the "Express Mail" mailing label was placed on each piece of correspondence prior to the original mailing; and

(C) include a true copy of the "Express Mail" mailing label showing the "date-in" or other official notation by the USPS.

PETITION TO CORRECT INCORRECTLY ENTERED DATE-IN

37 CFR 1.10(d) sets forth procedures for filing a petition to the Commissioner to accord a filing date as of the actual date of deposit with the USPS, where the "date-in" or other official notation is incorrectly entered by the USPS. Such a petition should:

(A) be filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;

(B) include a showing that the number of the "Express Mail" mailing label was placed on each piece of correspondence prior to the original mailing; and

(C) include a showing that the correspondence was deposited as "Express Mail" prior to the last scheduled pickup on the requested filing date.

The showing under 37 CFR 1.10(d) must be corroborated by (1) evidence from the USPS, or (2) evidence that came into being after deposit and within one business day of the deposit of the correspondence as "Express Mail." Evidence from the USPS may be the "Express Mail" Corporate Account Mailing Statement. Evidence that came into being within one day after the deposit of the correspondence as "Express Mail" may be in the form of a log book which contains information such as the "Express Mail" number; the application number, attorney docket number or other such file identification number; the place, date and time of deposit; the time of the last scheduled pick-up for that date and place of deposit; the depositor's initials or signature; and the date and time of entry in the log.

The reason the Office considers correspondence to have been filed as of the date of deposit as "Express

Mail" is that this date has been verified by a disinterested USPS employee, through the insertion of a "date-in," or other official USPS notation, on the "Express Mail" mailing label. Due to the questionable reliability of evidence from a party other than the USPS that did not come into being contemporaneously with the deposit of the correspondence with the USPS, 37 CFR 1.10(d) specifically requires that any petition under 37 CFR 1.10(d) be corroborated either by evidence from the USPS, or by evidence that came into being after deposit and within one business day after the deposit of the correspondence as "Express Mail."

A petition alleging that the USPS erred in entering the "date-in" will be denied if it is supported only by evidence (other than from the USPS) which was:

(A) created prior to the deposit of the correspondence as "Express Mail" with the USPS (e.g., an application transmittal cover letter, or a client letter prepared prior to the deposit of the correspondence); or

(B) created more than one business day after the deposit of the correspondence as "Express Mail" (e.g., an affidavit or declaration prepared more than one business day after the correspondence was deposited with the USPS as "Express Mail").

On the other hand, a notation in a log book, entered after deposit by the person who deposited the correspondence as "Express Mail" within one business day of such deposit, setting forth the items indicated above, would be deemed on petition to be an adequate showing of the date of deposit under 37 CFR 1.10(d)(3).

37 CFR 1.10(d)(3) further provides that a party must show that correspondence was deposited as "Express Mail" before the last scheduled pickup on the requested filing date in order to obtain a filing date as of that date.

PETITION FOR CORRESPONDENCE NEVER RECEIVED

37 CFR 1.10(e) sets forth procedures for filing a petition to the Commissioner to accord a filing date as of the date of deposit with the USPS, where correspondence deposited as "Express Mail" is never received by the Office. Such a petition should:

